

No. SC94745

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JERRI SMILEY,

Respondent.

**Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Calvin R. Holden, Judge**

APPELLANT'S REPLY BRIEF

CHRIS KOSTER
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-8756
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

Respondent (Defendant) contends that this Court does not have jurisdiction over this appeal because the circuit court's judgment striking the penalty provision of the armed-criminal-action (ACA) statute (section 571.015.1, RSMo 2000) that imposes a mandatory three-year term of incarceration was proper under the severance doctrine as outlined in *Associated Industries v. Director of Revenue*, 918 S.W.2d 780 (Mo. banc 1996), and thus did not render the ACA statute void for not having a valid punishment.

But in *Associated Industries*, which involved a Missouri use-tax statute that the United States Supreme Court had declared unconstitutional as applied, this Court on remand observed that under the doctrine of severability, a statute that is partially invalid only as applied must be effectively rewritten to accommodate the constitutionally imposed limitation “as long as it is consistent with legislative intent.” *Id.* at 784 (emphasis added). This Court, however, did not “rewrite” the taxing statute to accommodate the constitutional limitation, but instead decided that it would “refuse to speculate that the General Assembly would have approved the [taxing] statute as now limited,” and it struck down the statute in its entirety.

This Court also relied on *Associated Industries* when it declined to effectively rewrite the first-degree murder statute to eliminate the mandatory life-without-parole sentence as applied to juvenile offenders so as to accommodate the constitutional limitation imposed on the statute by *Miller v. Alabama*. See *State v. Hart*, 404 S.W.3d 232, 243–47 (Mo. banc 2013). In *Hart*, this Court “reject[ed] any application of the severance doctrine (or any other form of judicial construction) that results in any punishments for first-degree murder other than those plainly authorized in [the first-degree-murder statute].” *Id.* at 246–47. “To reach any other conclusion,” this Court wrote, “would require [it] to exceed its authority and violate constitutional separation of powers.” *Id.* at 247.

Contrary to Defendant’s argument, the severance doctrine cannot be lawfully applied in this case to effectively rewrite the ACA statute to eliminate what the circuit court deemed was an unconstitutional provision. Using severance under the circumstances of this case is plainly contrary to legislative intent since the unambiguous language of this statutory provision unquestionably provides for a mandatory minimum period of incarceration. Consequently, Defendant’s suggestion that the severing of this provision did not change or add a punishment, but still allowed the statute to exist consistent with legislative intent, is untenable. The court’s application of

severance in this manner allowed it to create a new punishment for ACA as applied to juveniles in contravention of the severance principles outlined in *Associated Industries* and *Hart*.

The circuit court's action in this case left no valid punishment for ACA as applied to juveniles. This rendered the statute void under the circumstances of this case since the circuit court's judgment left the statute without a valid punishment provision. Because the circuit court's action effectively dismissed the ACA charge pending against Defendant, this Court has jurisdiction over the State's appeal.

ARGUMENT

A. This issue is preserved for appellate review.

Defendant initially contends that the State has not preserved this issue for appellate review because it only “superficially” addressed Defendant’s circuit-court argument that the penalty provision of the ACA statute violated Missouri’s due-process and cruel-and-unusual punishments clauses. Deft’s Brief at 19–20. In the circuit-court case, the State responded to Defendant’s motion to declare the ACA statute unconstitutional in a ten-page “Motion in Opposition” that addressed Defendant’s constitutional claims. Defendant argues that the State’s response was insufficient to preserve this issue for appellate review under *State v. Davis*, 348 S.W.3d 768 (Mo. banc 2011).

But in *Davis*, the State’s argument challenging the circuit court’s judgment declaring a criminal statute unconstitutional was “raised for the first time on appeal.” *Id.* at 769. The defendant in *Davis* had challenged the statute under which he was charged, which prohibited a registered sex offender from being within 500 feet of a public park, as violating the constitutional prohibition against retrospective laws on the ground that he was required to register as a sex offender years before the criminal offense he was charged with violating was enacted. *Id.* at 769. The prosecutor responded to this argument in circuit court by stating that the law was not in fact

retrospective and that the defendant's case was distinguishable from a prior case in which this Court had held that new statutory obligations imposed on sex offenders based solely on past criminal acts violated the prohibition on retrospective laws. *Id.* But in its appeal from the circuit court's judgment declaring the statute unconstitutional, the State argued, for the first time, that the prohibition on retrospective laws applied only to civil, not criminal, statutes. *Id.* This Court held that since this specific issue had not been put before the circuit court to decide, it was not preserved for appellate review. *Id.* at 769–70.

Davis does not apply in this case since the State is not asserting any new or novel issue challenging the circuit court's judgment that was not raised below.

B. Defendant has failed to show that the ACA statute is unconstitutional as applied to juveniles.

Defendant argues that the constitution requires that the “juvenile factors” (youth and its attendant circumstances) be considered by the court in every case involving a juvenile offender and that any statutorily mandated minimum period of incarceration—no matter how brief—is inherently unconstitutional. Statutorily limiting the court's discretion to impose a

suspended sentence on a juvenile offender, Defendant contends, constitutes cruel and unusual punishment.

But in making this argument, Defendant does not address, or even acknowledge, the General Assembly's constitutional role in enacting legislation governing both juvenile and criminal matters. Defendant's argument simply presumes the legislature has no role and that the courts may use the power of judicial review to outline the contours of the juvenile-justice system under the guise of interpreting the state constitution. This novel and extreme view of the courts' role in interpreting the constitution and adjudicating criminal cases involving juvenile offenders is unprecedented in Missouri.

Defendant makes no effort to balance the unquestioned authority of the General Assembly to enact legislation on these matters within the reasonable limitations imposed by the federal and state constitutions. Neither the prohibition on cruel and unusual punishments nor the due process clause mention juveniles or suggest that the legislature is precluded from using its police powers to enact laws reflecting its considered policy judgment. Defendant nevertheless asserts that the circuit court had the authority to interpret these constitutional provisions in a manner that removes the General Assembly from its lawful place of enacting laws related to juvenile

and criminal matters and to prohibit it from enacting any legislation that imposes a minimum period of incarceration for a juvenile offender found guilty of a criminal offense. This argument not only wholly ignores the separation of powers among the branches of government, a bedrock principle of our state and federal constitutions, but is entirely contrary to the principle that legislative enactments should not be struck down unless they clearly and undoubtedly violate the constitution.

“While it is the duty of the courts to guard the constitutional rights of the citizen against merely arbitrary power, it is equally true that legislative enactments should be recognized and enforced by the court, as embodying the will of the people unless they are plainly and palpably a violation of the fundamental law of the Constitution.” *Borden Co. v. Thomason*, 353 S.W.2d 735, 743 (Mo. banc 1962). “The propriety, wisdom, and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the Legislature.” *Id.* at 744. “From its very nature the police power is a power to be exercised within wide limits of legislative discretion and if a statute appears to be within the apparent scope of this power the courts will not inquire into its wisdom and policy, or undertake to substitute their discretion for that of the legislature.” *Id.* The circuit court’s judgment here violated these basic principles by substituting the court’s policy judgment for

that vested in the legislature. *See State ex rel. Missouri Highways and Transp. Com'n v. Greenwood*, 269 S.W.3d 449, 458 (Mo. App. W.D. 2008) (courts are not “at liberty to ignore a clear mandate from the legislature merely because [the court] might perceive it to work a substantive injustice”).

Defendant also suggests that the three-year-minimum period of incarceration under the ACA statute is an “adult” sentence and that in passing this provision, the General Assembly only sought to determine the minimum sentence that “adults” should serve. But this argument overlooks the principle that the General Assembly is presumed to have known that a juvenile offender could be tried in a court of general jurisdiction and punished upon conviction for ACA, including imposition of a mandatory period of incarceration, when it passed the ACA statute in 1977. The juvenile-certification statute, which permits certain juvenile offenders to be prosecuted for criminal offenses in a court of general jurisdiction, was first enacted 20 years earlier in 1957. “The legislature is presumed to know the existing law when enacting a new piece of legislation.” *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001). In other words, when it enacted the punishment provision of the ACA statute, the legislature was presumed to be aware of the juvenile-certification statute and the potential that a juvenile offender could be criminally punished under

the ACA statute. The same presumption applies to the other criminal-offense statutes providing for mandatory minimum periods of incarceration mentioned in Defendant's brief and listed in section 559.100, RSMo Cum. Supp. 2013.¹

Defendant's argument that the United States Supreme Court's recent Eighth Amendment cases involving juvenile offenders warrant the result reached by the circuit court in this case is based on a misapprehension of the Court's holdings in those cases. The fallacy of this argument was addressed in the State's opening brief and need not be repeated here.

Defendant's brief contains an incongruous argument that concedes that mandatory incarceration for juvenile offenders is apparently not a concern in Missouri and that circumstances now exist that have "all but eliminated mandatory incarceration" for juvenile offenders. Deft's Brief 53. This includes

¹ This statute gives circuit courts the "power... to place on probation or to parole persons convicted of any offense over which they have jurisdiction, except as otherwise provided in section 559.115, section 565.020, sections 566.030, 566.060, 566.067, 566.125, 566.151, and 566.210, section 571.015, section 579.170, and subsection 3 of section 589.425." Section 559.100.1, RSMo Cum. Supp. 2013.

the fact that the juvenile-certification statute (section 211.071, RSMo Cum. Supp. 2013) protects juveniles from an automatic transfer to a court of general jurisdiction for criminal prosecution.

In addition, Defendant concedes that the so-called “dual-jurisdiction” statute (section 211.073, RSMo Cum. Supp. 2013) has virtually eliminated criminal sentences requiring mandatory incarceration for juveniles. Deft’s Brief 52. This statute requires the circuit court to “consider dual jurisdiction of both the criminal codes and juvenile codes for a juvenile offender who has been transferred to a court of general jurisdiction and convicted of a criminal offense.” Section 211.073, RSMo Cum. Supp. 2013. Under this statute, the court “is authorized to impose a juvenile disposition under [Chapter 211] and simultaneously impose an adult criminal sentence, the execution of which shall be suspended.” Section 211.073.1. Even after the juvenile offender turns 17, or if the Division of Youth Services determines that the offender is “beyond the scope of its treatment programs,” the circuit court retains authority to place the juvenile offender on probation. Section 211.073.3 and .4.

But Defendant then essentially argues that because these statutes provide a mechanism for courts to avoid imposition of a mandatory period of incarceration on a juvenile offender, any statute that provides for such a

sentence should be declared unconstitutional as applied to juveniles. If the mandatory incarceration of juveniles is not a problem in Missouri, this Court should be loath to use its power of judicial review to declare the ACA statute unconstitutional. Defendant's argument also suggests that courts may use the power of judicial review as a sort of legislative housekeeping device. The power of judicial review is a solemn act that should not be wielded in such a cavalier manner.²

Defendant also contends that a "statewide consensus" exists against mandatory incarceration for juvenile offenders, and she relies both on statistics showing that the number of juveniles transferred to courts of

² Defendant's brief also contains a convoluted argument suggesting that a five-year-old child could theoretically be criminally prosecuted and sentenced to life without parole for raping his sister. The improbable situation described in Defendant's brief is, of course, not present in this case. "Generally 'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" *State v. Vaughn*, 366 S.W.3d 513, 518 (Mo. banc 2012) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

general jurisdiction has fallen and on the number of parties who have signed off on the amicus brief filed on her behalf. But when the Supreme Court considers whether a “nationwide consensus” exists to prohibit a particular punishment under the Eighth Amendment, it invariably focuses on the legislative enactments of the States. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 563–67 (2005) (noting that the “objective indicia of society’s standards” is “expressed in legislative enactments and state practice”); *Graham v. Florida*, 560 U.S. 48, 62–64 (2010) (noting that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”). No comparable mechanism for determining consensus is possible within a state’s borders. Since no Missouri political subdivision has the authority to create its own juvenile-justice system or preclude the imposition of a mandatory minimum sentence of incarceration on a juvenile offender, it is impossible to discern what, if any, statewide consensus exists with respect to such a practice. Since the General Assembly has not specifically outlawed the imposition of a mandatory minimum sentence of incarceration on a juvenile offender, perhaps the strongest argument is that there is no statewide consensus against this practice. In any event, any attempt to discern a statewide consensus in interpreting

Missouri's constitutional prohibition against cruel and unusual punishment is ultimately a futile and unnecessary effort.

Defendant finally contends that any statute imposing a mandatory minimum period of incarceration on a juvenile offender violates principles of substantive due process. This argument is not well taken. "Substantive due process principles require invalidation of a substantive rule of law if it impinges on liberty interests that 'are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006) (quoting *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005)). "To be considered a 'fundamental' right protected by substantive due process, a right or liberty must be one that is 'objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005)). The right of a juvenile offender to avoid a three-year period of incarceration upon conviction for ACA is not a fundamental right protected by substantive due process.

CONCLUSION

The circuit court erred in declaring the penalty provision of the ACA statute (section 571.015) unconstitutional. This Court should reverse the circuit court's judgment.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P. O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-8756
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,792 words, excluding the cover and certification, as determined by Microsoft Word 2010 software; and that a copy of this reply brief was sent through the electronic filing system on October 7, 2015, to:

James Egan
630 N. Robberson
Springfield, MO 65806

Mae C. Quinn
One Brookings Drive, Box 1120
St. Louis, Missouri 63130

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-8756
Fax (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI